87-196

No.

Supreme Court, U.S.
FILED
JUL 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1987

ARTHUR DOBBS,
Petitioner,

vs.

FORD MOTOR COMPANY; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW; AND LOCAL 980 UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JUDSON L. LEVIN
Suite 202
46 Branford Place
Newark, New Jersey 07102
(201)623-0505
Attorney For Petitioner
Dobbs

QUESTIONS PRESENTED FOR REVIEW

SECTION I

1. Because a grievance claim of wrongful discharge which a union local had withdrawn is revived by order of the trial court and then resolved by an arbitration award during the course of litigation against the employer and union, is the fired worker arbitrarily precluded thereafter from a plenary hearing on other claims asserted (a) which were not resolvable by the labor arbitration and (b) which would have been adjudicated in a plenary hearing had the grievance not been revived?

2. After a trial court has revived a labor arbitration and an arbitration award has been rendered, does dismissal of the fired worker's claims for breach of duty of fair representation, employer subversion, counsel fees, and other relief, where such claims

are supported by manifestly sufficient evidence, conflict with decisions of this Court or present an important question of federal labor law which should be decided by this Court?

3. Does a labor arbitration award which declines to award four years of back pay to a wrongfully fired worker fail to draw its essence from the collective bargaining agreement when it is based on a letter from the employer to the union which is not part of the text of that agreement and would violate the union constitution and 29 U.S.C. §158(d) if permitted to modify or be part of that agreement? May such an award overrule an opinion and order of the court which are submission documents?

QUESTIONS PRESENTED FOR REVIEW
SECTION II

1. May a trial court modify or vacate the unambiguous language of a labor arbitration award(in favor of a wrongfully discharged worker)on the basis of matters which were not made part of the record before the arbitrator where the court concedes that the award draws its essence from the collective bargaining agreement?

2. May a trial court take any action which has the effect of modifying or vacating a labor arbitration award where both employer and union are precluded from applying for such relief by the statute of limitations and the applicable doctrine of waiver?

3. What constitutes actionable post award employer repudiation of collective bargaining agreement grievance procedure?

4. What constitutes actionable post award breach of duty of fair representation and fiduciary duty by a union local?

5. What constitutes actionable post award breach of duty of fair representation and fiduciary duty by a parent union?

(b)

LIST OF ALL PARTIES

SECTION I

Arthur Dobbs, Petitioner.

Ford Motor Company, Respondent.

Local 980, International Union, United Automobile,Aerospace,And Agricultural Implement Workers of America,UAW, Respondent.

The International UAW was also joined as a party. The complaint, as to that dedendant, was dismissed on motion and no appeal was taken from that dismissal.

Section I relates exclusively to District Court No. 82-2170; Circuit Court No.86-5787.

(b)

LIST OF ALL PARTIES

SECTION II

Arthur Dobbs, Petitioner.

Ford Motor Company, Respondent.

Local 980, International Union, United Automobile, Aerospace, And Agricultural Implement Workers Of America, Respondent.

International Union, United Automobile, Aerospace, And Agricultural Implement Workers Of America, UAW, Respondent.

Section II relates to District Court No.85-5660; Circuit Court No.86-5782.

(c)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW
SECTION I ..... i (a)

QUESTIONS PRESENTED FOR REVIEW
SECTION II..... iii (a)

LIST OF ALL PARTIES
SECTION I ..... v (b)

LIST OF ALL PARTIES
SECTION II ..... vi (b)

PETITION-Introduction..... xvii

SECTION I 1

OPINION BELOW..... 1 (d)

JURISDICTION..... 1 (e)

STATUTES INVOLVED..... 2 (f)

STATEMENT OF THE CASE..... 2 (g)

Nature Of The Case..... 2

Statement Of Facts..... 5

Statement Of Related Case..... 9

BASIS FOR FEDERAL JURISDICTION
IN THE DISTRICT COURT..... 10(h)(i)

REASONS RELIED ON FOR ALLOWANCE
OF THE WRIT..... 11(j)

Question No.1..... 11

Question No.2..... 16

(a)
Breach of duty of fair representation(DFR)..... 16

(b)
Employer Subversion(ES)..... 16

(c)
Compensatory damages not arbitrable. 17

(d)
Counsel fees..... 18

(e)
Punitive damages of Ford in firing petitioner in violation of the CBA and in refusing to reinstate him... 19

(f)
Punitive damages of Ford in subverting CBA grievance procedures... 21

Question No.3..... 23

S E C T I O N II 29

(d) OPINION BELOW..... 29

(e) JURISDICTION..... 29

(f) STATUTES INVOLVED..... 30

(g) STATEMENT OF THE CASE..... 30

Nature Of The Case..... 30

Course of Proceedings Below..... 31

Statement Of Facts..... 32

Statement Of Related Case..... 35

(h) (i) BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT..... 36

(j) REASONS RELIED ON FOR ALLOWANCE OF THE WRIT..... 37

Question No.1..... 37

Question No. 2..... 43
Statute Of Limitations..... 43
Waiver..... 44

Question No.3..... 46

Question No.4..... 47

Question No.5..... 48

CONCLUSION..... 50

INDEX TO APPENDIX-SECTION I

	Page
District Court ORDER* of November 21, 1983, Denying Unions' Motions For Summary Judgment.....	1a
EXTRACT FROM TRANSCRIPT OF HEARING ON MOTION TO REINSTATE GRIEVANCE of March 11, 1985*.....	2a
District Court Order* of March 25,1985	4a
MEMORANDUM DECISION of Umpire of July 18, 1985.....	5a
Copy of Record Attached to DECISION..	16a
Letter of Understanding of 1976.....	17a
District Court OPINION* of October 3, 1986.....	18a
District Court ORDER* of October 15,1986	38a
AMENDED ORDER In Related Action.....	39a
JUDGMENT ORDER OF Court Of Appeals*...	40a
Text Of 29 U.S.C. Section 185(a).....	41a
Notice Of May 1, 1981.....	42a
UNION GRIEVANCE Filed For Petitioner.	43a
Return Receipt Card Signed On May 16.	44a
Letter from Union Local of March 17,1982	45a
Ford Counsel's Letter Of October 22,1984	46a
Relevant Portions Of CBA.....	47a

*District Court Docket No.82-2170: Court of Appeals No.86-5787.

Extract of COMPLAINT, Action No.82-2170, Dated May 26,1982..... 49a

Extract of SECOND PRE-TRIAL ORDER, Filed November 9, 1984,Action No. 82-2170..... 50a

INDEX TO APPENDIX—SECTION II

OPINION Of District Court* of October 3, 1986..... 52a

AMENDED ORDER Of District Court* Of October 15, 1986..... 69a

JUDGMENT ORDER* Of Court Of Appeals.. 70a

Extract Of FINAL PRETRIAL* STIPULATION..... 71a

---

*District Court Docket No. 85-5660; Court Of Appeals No.86-5782

TABLE OF AUTHORITIES

SECTION I

Cases

	Page
Bowen v. United States Postal Service, 459 U.S. 212 (1983)	15,16, 18,20
Clayton v. International UAW, 451 U.S. 679 (1981)	15,16, 25
Dogherra v. Safeway Stores, Inc., 670 F.2d 1293 (9th Cir. 1982)	3,17
Dutrisic v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983)	12,18
Farmer v. ARA Services, Inc., 660 F.2d 1096 (6th Cir. 1981)	18
Hines v. Anchor Motor Freight, 424 U.S. 554 (1976)	11,15, 16
International v. Foust, 442 U.S. 42 (1979)	20
N.L.R.B. v. Acme Industrial Co., 385 U.S. 432 (1967)	17
Nuest v. Westinghouse, 313 F.Supp. 1128 (S.D. Ill. 1970)	27
Poller v. Columbia Broadcasting System, 368 U.S. 464	22
Richardson v. Communication Workers, 443 F.2d 974 (8th Cir. 1971)	18
Smith v. Wade, 461 U.S. 30 (1983)	21

United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593(1960)..... 25,26

Vaca v.Sipes,386 U.S.171(1967)..... 3,11, 13,15, 16

Statutes

28 U.S.C.§1254(1)..... 1

28 U.S.C.§1331..... 10

29 U.S.C.§158(d)..... 2,24

29 U.S.C.§185(a)..... 1,2,4, 10

TABLE OF AUTHORITIES

SECTION II

Cases — Page

American Postal Workers v.United States, 789 F.2d 1(D.C.Cir.1986) 47

Bowen v.United States Postal Service, 459 U.S.212(1983)..... 46

Brotherhood v.Celotex,708 F.2d 488 (9th Cir.1983)..... 47

Dogherra v.Safeway Stores,Inc. 670 F.2d 1293(9th Cir.1982)..... 46

Dreis & Krump Mfg. v. Intern. Ass'n of Machinists, 802 F.2d 247(7th Cir.1986)..... 44

Dutrisic v.Caterpillar Tractor 749 F.2d 1270(9th Cir. 1983)..... 48

Federation v.Westinghouse,736 F. 2d 896(3d Cir.1984)..... 44,47

Ficek v.Southern Pacific,338 F.2d 655(9th Cir.1964)..... 44

International Brotherhood of Electrical Workers v.Foust, 442 U.S.42(1979)..... 48

International v. Mobay,755 F.2d 1107(4th Cir.1985)..... 38,44, 47

International Brotherhood v. Washington Employers, 557 F.2d 1345(9th Cir.1977) 41

Kane Gas v. International Brotherhood,687 F.2d 673(3d Cir.1982) 47

Local 863 Intern.Broth.v. Jersey Egg Prod.,773 F.2d 530(3d Cir.1985)..... 41

Piggly Wiggly v.Piggly Wiggly,611 F.2d 580(5th Cir.1980)..... 38

Service Employees v. Office CTR, 670 F.2d 404(3d Cir.1982)..... 43

Teamsters v.J.H.Merrit,770 F.2d 40(3d Cir.1985)..... 44,47

United Brotherhood v. FMC Corp, 724 F.2d 815(9th Cir.1984).... 43

United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593(1960)..... 39

Vaca v. Sipes,386 U.S.171(1967).... 46

Virgin IslandsNursing v. Schneider, 688 F.2d221(3d Cir.1981)..... 38

W.R.Grace v. Rubber Workers, 461 U.S.757(1983)..... 39,47

Statutes

9 U.S.C.§12..... 35

28 U.S.C.§1254(1)..... 29

28 U.S.C.§1331..... 36

29 U.S.C.§185(a)..... 29,30, 36

N.J.S.A.2A:24-7..... 30,35

No.

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1987

ARTHUR DOBBS,
Petitioner,
vs.
FORD MOTOR COMPANY; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW: AND LOCAL 980 UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Arthur Dobbs, the plaintiff in the proceedings below, petitions for a writ of certiorari to review judgments of the United States Court of Appeals for the Third Circuit in two cases. The two cases

involve closely related questions and identical parties. This petition accordingly covers both cases pursuant to RULE 19.4.

The petition is divided into two sections.

Section I contains the questions and reasons relied on relating to Court Of Appeals No. 86-5787, District Court No. 82-2170. This action contains claims which arose before a labor arbitrator rendered his award.

Section II contains the questions and reasons relied on relating to Court of Appeals No. 86-5782, District Court No. 85-5660. This action contains claims which arose after the award.

Each section is presented in the form prescribed by RULE 21.

(d)

OPINION BELOW

There was no opinion in Third Circuit Court of Appeals, Docket No.86-5787. The order of the court, dated, May 15,1987, is as follows.(It appears in full at Pa40)

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered October 15,1987[sic]be and the same is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,
/s/Weis
Circuit Judge

The opinion of the district court is unreported. It is set forth in the Appendix.*

(e)

JURISDICTION

The date of the judgment sought to be reviewed is May 15, 1987. The subject matter jurisdiction of the district court is based on 29 U.S.C.§185(a).

Jurisdiction is conferred on this Court by 28 U.S.C.§1254(1).

---

* Pa18

(f)

STATUTES INVOLVED

The relevant portion of 29 U.S.C.§185(a) (Section 301(a), Labor Management Relations Act) is set forth in the Appendix. (Pa41)

The relevant portion of 29 U.S.C.§158(d) provides that

> For purposes of this section, to bargain collectively is...the execution of a written contract incorporating any agreement reached if requested by either party...

The relevant text of Article 19 of the UAW Constitution,Section 4 is as follows.

> National agreements and supplements thereof shall be ratified by the Local Unions involved.

(g)

STATEMENT OF THE CASE

Nature Of The Case

Petitioner's complaint claims that he was fired by respondent Ford in violation of the collective bargaining agreement(hereafter "CBA") between his employer and the UAW. He claims all relief available under the CBA

and at law. In order to proceed against his employer, he was obliged to claim simultaneously that his union local breached its duty of fair representation(hereafter "DFR") when it withdrew his grievance. He also claims that his grievance was withdrawn because of employer subversion of the CBA procedure(hereafter "ES").(Pa50)

Breach of DFR has been the subject of numerous opinions since Vaca v.Sipes,386 U.S. 171(1967). ES has been discussed in only one case since Vaca, Dogherra v.Safeway Stores, Inc.,670 F.2d 1293(9th Cir.1982).

Course Of Proceedings Below

Through March 25,1985, motions were filed and disposed of as follows.

The unions' first motion for summary judgement was denied except for the issue of punitve damages which were stricken as to the unions.* A second motion for summary judgment was denied with respect to Local 980 and granted with respect to the UAW International.

*Pa1

A Ford motion for summary judgment was denied with respect to all claims arising under 29 U.S.C.§185(a) and the CBA and granted with respect to some ancillary state claims. At the invitation of the district judge, Ford then moved to reinstitute the withdrawn grievance; it also moved to dismiss the complaint. By ORDER of March 25, 1985, the district court revived the grievance and refused to dismiss. However,it ordered that the action be"administratively terminated". (Pa4)

The CBA arbitrator(hereafter the "umpire") rendered his award(hereafter the "DECISION") in July, 1985. He ruled that petitioner's discharge violated the CBA, restored him to his "former position",* but declined to address the issue of back pay* on the basis of a letter written by Ford to the UAW in 1976. Petitioner filed a timely motion to vacate the objectionable portion of the DECISION. He also moved to

---

*Pa14

vacate the administrative termination and proceed to trial on all issue not resolved or resolvable in the CBA arbitration. By opinion and order of October, 1986, the district court denied the application to vacate the portion of the DECISION of the umpire claimed to be defective and refused to allow petitioner to proceed to a plenary hearing on any claim. (Pa18,38)

The district court opinion confused or,rather fused,this action with a related action on which the court ruled at the same time. The related action is Docket No. 86-5782,Third Circuit Court of Appeals.*

Those portions of the opinion which relate to this action are reproduced in the Appendix. (Pa18 et seq.)

Statement Of Facts

The following facts are not disputed.

Petitioner, a Ford assembly plant employer since 1972, was on conditional medical leave through May 5, 1981, with no notice

*The subject of Section II of this petition.

that his leave status was being questioned. On May 1,1981(a Friday), Ford mailed a five-day notice to report to the plant for(Pa42) medical examination by certified mail. The notice did not conform to the form specified by the CBA as the form which can constitute a basis for firing. Though petitioner's address was 52 Dover Street, Newark, New Jersey, the notice was mailed to 52 Doyer Street, Newark. The Doyer spelling appears on only one of many Ford records. The incorrect spelling arose because some time in 1977 Ford personnel mistook petitioner's handwritten V for a Y and carelessly failed to compare it with handwritten V in the worde "Ave." on the same record. (Pa42,16)

On May 13, he reported to work at Ford and was told that he was fired, for failing to respond to the notice,as of May 11. He denied having received the notice. Unknown to him, the post office changed Doyer to Dover and made an unsuccessful delivery attempt on May5. On May 15, after his appearance at Ford, he received a slip to

pick up a certified letter at the nearest post office. He obtained the certified mail there on Saturday, May 16.

When Ford fired petitioner on May 13, it had no proof as to whether or not he had received the notice. A few days later Ford received the standard green card which petitioner signed on May 16, complete proof that he did not receive a notice on or about May 4 and that he did receive it on May 16. But Ford did not reinstate petitioner. (Pa44)

Local 980 filed a timely grievance, which correctly made four claims:1."...aggrieved was on medical leave." 2."...received no such quit notice". 3."...aggrieved followed all company rules pertaining to extending such medical leave". 4."...therefore Union contends discipline was unjust". All facts needed to substantiate these claims were in Ford records. (Pa43)

This was a second stage grievance which was withdrawn before the end of second stage.

BE

ST AVAILABLE COPY

No hearing of any kind took place because the grievance was withdrawn* before the stage at which hearings take place. The only written reason for withdrawal appears in a union letter of March 17, 1982. (Pa45)

> For reasons the Union felt that they did not hold merit to move to the Third Stage of the Collective Bargaining Agreement.

By letter of Ford counsel of October 22, 1984, Ford admitted furnishing the union with false information:that petitioner received the notice on May 4, 1981. (Pa46)

> At the time that the grievance was filed, Ford's Labor Relations Department believed that plaintiff had received the notice to report for physical on May 4, 1981. Even though the employee's actual receipt of the notice was not a prerequisite to his termination, the Labor Relations Department (based upon a good faith belief) that the notice had been delivered on the fourth) advised the union of delivery on that date.

The only disputed fact of any relevance is petitioner's contention that he actually was at the plant medical department on May 4 or 5 to process the final extension of his medical leave, May 4 being the very day he was directed to be there in the notice which

---

*January, 1982

he did not receive until May 16. His contention appears in an affidavit filed in opposition to one defendant's motions to dismiss. The umpire did not rest his DECISION on this contention which is not essential to any relief claimed by petitioner. (Pa8 et seq.)

Petitioner was not recalled to work until June, 1986, pursuant to the DECISION of July, 1985.

Statement Of Related Case

Pursuant to RULE 19.4 this petition is filed to cover also the Third Circuit JUDGMENT ORDER in Docket No.86-5782, which is related to this action. This action arises from the discharge of petitioner in May, 1981, and his claim that a defective portion of the umpire's DECISION should be vacated. The related action seeks to confirm and enforce the portion of the DECISION which is not objectionable and claims relief for POST AWARD conduct of respondents, only—

conduct which occurred only after the umpire rendered his DECISION in July, 1985.*

(h)(i)

BASIS FOR FEDERAL JURISDICTION
IN THE DISTRICT COURT

This action, based primarily on 29 U.S.C.§185(a), was filed in the Superior Court of New Jersey. Respondent Ford immediately moved for transfer to The United States District Court For New Jersey, which has jurisdiction pursuant to 28 U.S.C§1331 .

---

* The related action is the subject of Section II of this petition, page 29 et seq.

(j)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Question No.1-Section I

At the outset, it must be stressed that this action does not involve a trivial grievance. Petitioner was fired from his job. His Section 301(a) action is based on the theory that conduct of his union, or his employer, or both undermined the CBA grievance process and caused an unfavorable outcome.* Vaca v.Sipes,386 U.S.171(1967);Hines v.Anchor Motor Freight,424 U.S.554(1976). If petitioner could establish undermining, he was eligible to claim again the wrongfulness of his discharge on CBA grounds. In most reported cases, relief arrives, if at all, in the litigation. In this action,after three years of litigation,the district judge fashioned excellent relief before a plenary hearing. He revived the abandoned grievance which was clearly not "frivolous" or "fruitless".Vaca,386 U.S.191,194.

*See SECOND PRE-TRIAL ORDER,Pa50.

He could not have done so if this action were not different from Vaca and Hines and most reported cases in which the union has prosecuted the grievance into or through an advanced CBA hearing stage with negative result. In such cases, the union has, by proceeding to such hearing stage, virtually conceded that the grievance is not "frivolous" or "fruitless", and the principal issue is whether its conduct of the grievance involved breach of DFR which was a proximate cause of the unfavorable result. In this action (like Dutrisic v.Caterpillar Tractor Co., 749 F.2d 1270(9th Cir.1983)),the grievance was abandoned before an advanced stage. The abandonment must be the proximate cause of the unfavorable outcome, because it precluded any other possible result, and the only issue is breach of DFR(or ES). Under these circumstances, breach of DFR is based on the infrequently cited language of

Vaca relating to the duty to process grievance claims which are not frivolous and fruitless(386 U.S.194).

> In a case such as this, when Owens supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory manner.

In this action, after denial of three motions for summary judgment had demonstrated that petitioner's claims were not frivolous, the district judge revived the grievance.[1] (The subsequent umpire's DECISION elevated the claims from non-frivolous to meritorious as a matter of law.) Having fashioned this relief, the district judge, in refusing to vacate the administrative dismissal[2] after petitioner returned to court from the largely successful CBA arbitration, simply denied petitioner the right to litigate (a) those claims[3] which were not disposed of by the CBA arbitration,many of which had survived motions for summary judgment, and

---

[1] Pa4 [2] Pa38 3 See claims at Pa50. Most claims along with counsel fees were the subject of motions in limine.

which (b)arose through and because of the litigation and were never resolvable by CBA arbitration. The reasoning of the district court is not clear. If it refused to permit petitioner to proceed to plenary hearing of his unarbitrated claims merely because there had been an award on the CBA issues, the opinionless affirmance of the Third Circuit sanctions an unprecedented departure from the usual course of judicial proceedings by the district court which has never been addressed by this or any other court.

In Section 301(a)actions arising from grievance withdrawals which occur before advanced CBA stages, the frivolity issue can usually be resolved on motion early in the proceedings; on denial of a motion for summary judgment or on motion made by the plaintiff. If the ruling is not in plaintiff's favor, the case is over. If the ruling is in plaintiff's favor, the grievance can be revived immediatley, and the nonarbitrable claims arising from the liti-

gation and necessity therefor, such as the claim for counsel fees, will be smaller the faster the revival of the grievance is ordered. The denial of a plenary hearing on nonarbitrable claims which would have occurred had the grievance not been revived conflicts with the applicable decisions of this Court in Vaca v.Sipes,386 U.S.171 (1967);Hines v.Anchor Motor Freight,424 U.S.554(1976);Clayton v.International UAW, 451 U.S.679(1981);Bowen v.United States Postal Service,459 U.S.212(1983).

This Court has never held that granting some relief to a plaintiff operates to deny him a plenary hearing on all other meritorious, properly pleaded claims.

Question No.2 -Section I

If the opinion of the district court constitutes dismissal of claims or grant of summary judgment sua sponte, affirmance by the Third Circuit is in clear conflict with applicable decisions of this Court on these factually and legally sufficient issues:

(a) Breach of duty of fair representation (DFR). Before the opinion and order of October, 1986, in the district court, two union motions and one Ford motion for summary judment had been denied. Nothing but the succesful revival of the grievance occurred in the interval. Nothing had occurred to effect a vacating of the prior denials and the right to plenary hearing under Vaca, Hines, Clayton, and Bowen on breach of DFR.

(b) Employer subversion (ES). This claim arises out of the alleged outrageous failure of Ford to furnish correct information to petitioner's union(that he did not receive the notice until May 16) after furnishing false information(that he received it on May 4). Infrequently cited language of Vaca

at 386 U.S.186 holds that

> the employee should not be limited to the exclusive remedial procedures established by the contract when the conduct of the employer amounts to a repudiation of those contractual procedures.

Only one case on the subject has been located. Dogherra v.Safeway Stores,Inc., 484 F.Supp.396; 670 F.2d 1293(9th Cir.1982). However, this Court has held, N.L.R.B. v. Acme Industrial Co.,385 U.S.432(1967),435, that

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.

Nothing occurred prior to October, 1986, to remove this issue from the action.

(c) Compensatory damages not arbitrable. Petitioner claims damages for mental suffering arising out the long,whipsaw abuse by respondents prior to and during the litigation. The district court and the circuit court did not address this subject, which should be settled by this Court, and is supported by respectable authority. Farmer

v.ARA Services, Inc.,660 F.2d 1096,1106 (6th Cir.1981);Richardson v.Communication Workers, 443 F.2d 974,984(8th Cir.1971).

(d) Counsel fees. The circuit court affirmed the denial of counsel fees on the basis of the completely inapposite "American Rule".* This occurred in spite of petitioner's efforts to present the correct rule for allowance of counsel fees which is succinctly stated in Bowen v. United States Postal Service,459 U.S.212 (1983),236,footnote 6, which notes that

> ... such damages measure the extent by which the union's breach of duty adds to the difficulty and expense of collecting from the employer.

Counsel fees may be claimed under this apposite theory even if the claim against the employer is unsuccessful. Dutrisic v. Caterpillar Tractor Co.,749 F.2d 1270 (9th Cir.1983).

In defending against the assaults on his case, pressing his claims, and preparing for one trial date over a three year period before the revival of the grievance

*Pa31

and in pressing claims thereafter, exhausting legal services were performed on behalf of petitioner. But for counsel, petitioner's action could not have reached the point where revival of the grievance(a demand of the complaint)* could have occurred. Counsel fees are an essential part of the legal process for correcting malfunctions in the congressionally mandated system of private resolution. Others, like petitioner, may have to engage in legal combat with large employers and large unions to correct malfunctions. No success is possible without counsel's hard work. The chilling denial of counsel fees is at variance with usual judicial proceedings,approved by this Court.

(e) Punitive damages of Ford in firing petitioner in violation of the CBA and in refusing to reinstate him. Ford fired petitioner and refused to rescind its action in spite of evidence in its possession that he did not receive a notice on May 4. Ford knew this by late May but continued alleged

*Pa49

arrogance through a four year period including three years of litigation.(Pa44)

In Bowen v.United States Postal Service, 470 F.Supp.1127(W.D.Va.1979),1131,the employer was found to have fired plaintiff without just cause and in reckless and "callous" disregard of his rights. The district judge found that punitive damages were awardable;they were not awarded because the employer enjoyed a sovereign immunity from them. This Court at 459 U.S.215 and 216, note 4, reported the district court proceedings without disapproval.

> The District Court had instructed the jury that both the Union and the Service could be liable for punitive damages if either had acted "maliciously or recklessly or in callous disregard of the rights of the plaintiff [Bowen]".

This Court so observed(1983) some time after its decision in International v. Foust,442 U.S.42(1979), held that such damages were unavailable against a union. The callousness element appears again in this Court's decision in apposite civil rights

litigation. Smith v. Wade, 461 U.S.30,56 (1983).

> We hold that a jury may be permitted to assess punitive damages in an action under §1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

The ruling in this action on the issue of punitive damages in firing petitioner is not correct unless it is supported by a decision of this Court or the evidence is insufficient. The decision of the circuit court is not supported by a decision of this Court, and the evidence is abundantly sufficient. The issue should be decided by this Court. The system of private resolution is not promoted as long as petitioner's long ordeal can be inflicted with impunity.

(f) Punitive damages of Ford in subverting CBA grievance procedures. Ford failed to provide the union with correct information* (that petitioner received a notice on May 16, rather than May 4) at any time before his grievance was withdrawn by his local union.

---

*Pa44

Punitive damages for this outrageous repudiation of CBA grievance procedures, which caused the union to believe that petitioner was lying*, is supported by the cases cited immediately above. Here,again, the employer's conduct should be punishable with the deterring effect that other employees may be spared the ordeal to which petitioner was subjected. If the affirmance by the circuit court is not in conflict with decisions of this Court, this issue should still be addressed by this Court. Summary judgment is inappropriate "where motive and intent play leading roles". Poller v. Columbia Broadcasting System,368 U.S.464,473.

---

*Petitioner can think of no other reason for the union local's letter(unsigned) of March 17, 1982(Pa45)which is the first and only writing he received from the local after the GRIEVANCE (Pa43)was filed.

Question No.3-Section I

The defective portion of the umpire's DECISION(declining to consider back pay) reads as follows. (Pa14)

> Under the parties' Letter of Understanding on Reinstitution of Grievances dated October 5, 1976, the Company is not liable for back pay prior to the date of reinstitution.

The umpire equated the revival order of the district court of March 25, 1985, with a reinstitution of the grievance under the "Letter". Neither that order nor the "Letter" ever contemplated such a result following a court ordered revival of grievance. Neither the umpire nor any court below responded to petitioner's argument that, even if applicable, he was entitled to back pay from May 11, 1981(date of discharge) to January, 1982(date the grievance was allegedly withdrawn) under the very terms of the " Letter". (The "Letter" appears at Pa17.)

But the DECISION is here defective for an additional reason. Based frankly on the "Letter", it cannot draw its essence from

the CBA,because the "Letter" cannot be part of the CBA. The language of the "Letter" has never been shown to appear in or be part of any CBA booklet available to workers or anybody else since 1976.

There has never been a showing that the "Letter" was ratified as required by Section 4,Article 19, of the CONSTITUTION OF THE INTERNATIONAL UNION, which reads:

> National agreements and supplements thereof shall be ratified by the Local Unions involved.

The "Letter" forms no part of a written contract as required by 29 U.S.C.§158(d).

> For purposes of this section, to bargain collectively is...the execution of a written contract incorporating any agreement reached if requested by either party...

The "Letter" is not even an agreement under basic contract law. At most it appears to be an offer which petitioner did not know of. There has never been a showing of ratified acceptance or any action in reliance. The "Letter" simply is not part of a CBA from which any essence can be

drawn by an arbitrator.

Finally, the third paragrpah of the "Letter" reads as follows. (Pa17)

> It is understood by the parties, however, that the Company will not be liable for any back pay claims from the time of original disposition to the time of reinstitution of the grievance and it is further agreed that the reinstitution of any such grievance shall be conditioned upon agreement by the Union and employe(s) that neither will pursue such back pay claim against the Company.

Petitioner never made such an agreement, and there is no record of a showing that his union did. But in no event can the "Letter" impose remedies, illusory or otherwise, upon petitioner which are less adequate than those available in litigation. Clayton v. International UAW, 451 U.S.679 (1981),685. And the seminal case on arbitral scope, United Steel Workers v.Enterprise Wheel &Car Corp., 363 U.S.593(1960), 597, holds that

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining

> agreement; he does not sit to dispense his own brand of industrial justice.

In this action, United Steel Workers does no more than echo the actual language of the CBA (Pa47) which provides that the umpire shall be empowered "to make a decision in cases of alleged violation of the terms of this Agreement or written local or regional agreements supplementary thereto". His powers are limited in that— "He shall have no power to add to or subtract from, or modify any terms of any agreement." (Pa47)

If the defective portion of the umpire's DECISION should be vacated, there are,as set forth in petitioner's briefs below, two bases for disposition of the back pay claim by the district court. First, the court has the power to compute and order the relief which the umpire disregarded. United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S.593,599. Second, the

court always had the power and duty to decide the claim in the litigation. Since the CBA arbitration malfunctioned in this one respect, the claim simply falls back to the court for resolution. Nuest v. Westinghouse, 313 F.Supp.1128(S.D. Ill. 1970),1237.

The OPINION OF March 11, 1985, ruled that "the grievance is to relate back to the date the grievance procedure was originally abandoned."(Pa2) The ORDER of March 25, 1985, provided that "the date of the grievance is to relate back to the date the grievance was originally withdrawn..."(Pa6) These were principal SUBMISSION documents. Petitioner took them to mean that the grievance was to proceed as if it had never been withdrawn.

The OPINION of October 3, 1986, permitted the arbitrator to reverse the court. (Pa18 et seq.)

No party, nor the court had considered

the "Letter" in connection with the back pay aspect of petitioner's damage claims before the umpire rendered his award in July, 1985. Even if operative, the "Letter" could not have been applicable had the grievance not been revived. But petitioner can find no comparable case in which an arbitrator has been permitted to overrule specific directions of a court.

(d)

OPINION BELOW

There was no opinion in the Third Circuit Court Of Appeals, Docket No.86-5782. The order of the court, dated, May 15, 1987, is as follows. (Pa70)

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is
ADJUDGED AND ORDERED that the judgment of the district court entered October 15, 1986 be and the same is hereby affirmed.
Costs taxed against appellant.

BY THE COURT,

/s/Weis
Circuit Judge

The opinion of the district court* is unreported. It is set forth in the Appendix insofar as it relates to this action.

(e)
JURISDICTION

The date of judgment sought to be reviewed is May 15, 1987. The subject matter jurisdiction of the district court is based on 29 U.S.C.§185(a).

Jurisdiction is conferred on this Court by 28 U.S.C.§1254(1).

---

* Pa52

(f)

STATUTES INVOLVED

29 U.S.C.§185(a)(Section 301(a),Labor Management Relations Act) provides.

> Suits for violation of contracts between an employer and a labor organization representing an employee in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

N.J.S.A.2A:24-7[New Jersey] provides.

> A party to the arbitration may, within 3 months after the award is delivered to him, unless the parties shall extend the time in writing, commence a summary action in the court aforesaid for the confirmation of the award or for its vacation, modification, or correction. Such confirmation shall be granted unless the award is vacated, modified, or corrected.

(g)

STATEMENT OF THE CASE

Nature Of The Case

In this action petitioner seeks to confirm and enforce that portion of an arbitration award under a collective bar-

gaining agreement(hereafter "CBA") which reinstated him to his former position and directed that he be made whole for earnings lost since March 25, 1985, the date that the trial judge in a related action (Third Circuit,Docket No. 86-5787)ordered that his previously withdrawn grievance be revived.(Pa14,4)

Petitioner also claims that post award conduct of his employer constitutes employer subversion(hereafter "ES") of the CBA grievance procedure. He also claims that Local 980 and the International UAW in post award conduct breached their duty of fair representation(hereafter "DFR") and fiduciary duty in failing to commence post award legal proceedings for him and in actively joining his employer against him on every issue. All claims are at Pa71.

Course Of Proceedings Below

Shortly after answers were filed, petitioner moved for confirmation and

enforcement of the favorable portion of the arbitration award. Each defendant moved for summary judgment. The district judge advised that he would decide these motions without oral argument and rendered his opinion in October, 1986. He did not rule explicitly on petitioner's motion. Each defendant's motion was granted. Since the order of the court confirmed the award and since confirmation was relief for which plaintiff had moved, the action was in a somewhat unclear posture. In effect, the court modified the award to correspond with the employer's interpretation,pursuant to which it refused to put petitioner to work or make him whole. (Pa39,69)

Statement Of Facts

Petitioner was fired by respondent Ford in May, 1981, for alleged failure to comply with a five-day notice. In a re-

lated action(Third Circuit,Docket 86-5787) the trial judge by order of March 25,1985, ordered that petitioner's grievance, withdrawn by his union local in January,1982, be revived and continue from the point at which it had terminated in the CBA grievance procedure. (Pa4)

The grievance became the subject of an umpire's award(hereafter the "DECISION") dated, July 16,1985, which awarded that

(Pa14) The Aggrieved shall be reinstated to his former position with full seniority rights and shall be made whole in the usual manner for earnings lost since March 25, 1985, the date the Federal District Court ordered reinstatement of the grievance, which had previously been withdrawn.

The DECISION was served on all parties before the end of July, 1985. However, respondent Ford did not return petitioner to work and payroll, nor did it make him whole. Not knowing how long this conduct would continue and mindful of a six month statute of limitations, petitioner's counsel requested action by his union. That

request was not honored, and this action was commenced.

Respondent Ford's position,stated in its answer to petitioner's FIRST COUNT, is that

> Assuming that plaintiff's employment had not been terminated in May, 1981, he would have been laid-off on March 11, 1983. In accordance with his seniority lay-off status the plaintiff is currently 39th on the recall list and based upon Ford's current operations in New Jersey, the plaintiff is not eligible for recall and he would not have lost any earnings(based on employment with Ford)subsequent to March 25, 1985.

This contention was <u>not</u> put to the umpire in the CBA arbitration. The workings of the alleged recall list also had not been the subject of evidence before the court. Ford contends that it compled with the DECISION by placing petitioner on such a list. In June, 1986, it recalled petitioner to work. It has never made him whole for earnings lost since March 25, 1985.

Respondent Ford did not move to

vacate or modify the DECISION within the three month period of N.J.S.A.2A:24-7, as mandated by federal labor decisions, or within the identical time provided by 9 U.S.C.§12 of the federal arbitration statute. Nor was its answer filed within that period of time.

The respondent unions, in spite of the facial merit of petitioner's post award claims and need for relief,refused to represent him,and their counsel,rather than remain silent or neutral on issues concerning Ford alone, argued in support of Ford on every issue concerning it.

Statement Of Related Case

Pursuant to RULE 19.4 this petition is filed to cover also the Third Circuit JUDGMENT ORDER in Docket No.86-5787, which is related to this action. This action seeks to confirm and enforce the portion of the umpire's DECISION which awarded relief and seeks relief from POST AWARD

conduct of respondents only, that is conduct which occurred only after the umpire rendered his DECISION in July, 1985.(Pa71)

The related action arises from the discharge of petitioner in May, 1981, and his claims that a defective portion of the umpire's DECISION should be vacated. Only PRE-AWARD conduct is involved.*

(h)(i)

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

This action was filed in the Superior Court Of New Jersey. On the basis of 29 U.S.C.§185(a), respondent Ford moved for transfer to The United States District Court For New Jersey, which has jurisdiction pursuant to 28 U.S.C.§1331.

---

*The related action is the subject of Section I of this petition.

(j)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Question No.1 - Section II

The relevant portions of the CBA with respect to the appeal follow.

> Article IV,Section 3
> The Company retains the sole right to discipline and discharge employees for cause, provided that in the exercise of this right it will not act wrongfully or unjustly or in violation of the terms of this Agreement.
>
> Article VII,Section 16
> (a) Scope Of Powers
> It shall be the function of the Umpire, and he shall be empowered, except as his powers are limited below, after due investigation, to make a decision in cases of alleged violations of the terms of this Agreement or written local or regional agreements supplementary thereto, of grievances...
> (b) Limitations on Powers
> The powers of the Umpire are limited as follows:
> (1) Changes in Agreements
> He shall have no power to add to or subtract from, or modify any terms of any agreement.
> (2)...[Not applicable]
> (3) Matters within Company Discretion

He shall have no power to substitute his discretion for the Company's discretion where the Company is given discretion by this Agreement or by any supplementary agreement,except that where he finds finds a disciplinary layoff or discharge is in violation of the standards set up in this Agreement, he may make appropriate modifications of the penalty.

Section 19.Finality of Umpire Awards;Exclusiveness of Remedy

There shall be no appeal from an Umpire's decision. It shall be final and binding on the Union, its members, the employe or employes involved and the Company.

The scope of issues resolvable by an arbitrator is determined by the submission documents. In this action these are the CBA, the grievance, the judge's opinion and order of March, 1985. Piggly Wiggly v. Piggly Wiggly,611 F. 2d 580(5th Cir.1980), 583,584; Virgin Island Nursing v.Schneider, 688 F 2d.221(3d Cir.1981),223; International v.Mobay,755 F.2d 1107(4th Cir.1985), 1110. (Pa43,2,4)

The rule regarding court review of arbitration awards is that the court must

defer to the award so long as it draws its essence from the CBA. United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S.593(1960); W.R.Grace v. Rubber Workers, 461 U.S.757(1983). Although he opined that he followed this rule and was affirming the umpire's DECISION, the trial judge took extensive notice of the alleged possible layoff, which had not been the subject of evidence before him or the umpire, and radically modified the award or, in effect, vacated it and substituted his own. This conduct, not found in any reported case, was affirmed by the circuit court. (OPINION at Pa52)

The umpire found nothing with respect to a recall list because the subject was not presented to him. (On the other hand, if he did take notice of such a list, his DECISION is even more impervious to modification.) He awarded that petitioner (1) "be reinstated to his former position" and (2) that he be made whole

from March 25, 1985. (Pa14)

The opinion and order of the trial court transformed this award into an award that petitioner (1) be restored to his "former position" on a recall list that he had never been on(because he was fired in May, 1981, and allegedly would have been laid off in March, 1983) and (2) NOT be made whole. (Pa 56,69)

Petitioner commenced this action to confirm the award as written by the umpire and to enforce it because he had received no wages or call to work pursuant to it. The trial judge confirmed an award that petitioner need not be called to work or paid anything. Such an award has never existed.

If words have meaning, the court of appeals affirmed the granting of respondent Ford's application* for vacating or modifying the DECISION in a trial court opinion which stated that it was doing something else.(Pa52 et seq.)

---

*It was never the subject of a motion.

Had the matter of the alleged recall list been presented to the umpire, he would have had authority, from the essence of the CBA, to award as he did. He had authority to fashion a just award. Local 863 Intern.Broth.v.Jersey Egg Prod., 773 F.2d 530(3d Cir.1985). He might(or may) have found that petitioner, having been unjustly discharged, had been unemployed longer than anybody else on an alleged recall list and that he should, therefore, be at the top of it. He might also have found that excepting petitioner from an alleged recall list was a de minimis matter. International Brotherhood v.Washington Employers,557 F.2d 1345(9thCir.1977),1350.

In affirming a trial court opinion which erroneously modified or vacated an award in a labor arbitration while stateing it was not doing so, the court of appeals sanctioned a departure from the usual course of judicial proceedings

which calls for an exercise of this Court's power of supervision. The substance or result of the affirmed opinion of the district court conflicts with decisions of this Court cited above.

Question No.2-Section II
Statue Of Limitations

Respondent Ford contended that the DECISION must be construed to mean something other than what it stated. Whatever the precise nature of the relief which Ford wanted or required(Modification? Vacation? Interpretation? Declaratory Relief?) on whatever grounds(Umpire exceeded CBA authority? Intrusion on management rights?),it was necessary to move for the desired relief or raise it in an answer within the three month period of 9 U.S.C.§12(The Federal Arbitration Act) or the three month period of N.J.S.A. 2A: 24-7 of New Jersey made applicable by federal decisions in the field of labor law in the Third Circuit and most others. Service Employees Union v. Office CTR, 670 F.2d 404(3d Cir.1982),412; United Brotherhood, v.FMC Corp.,724 F.2d 815 (9th Cir.1984). Ford did not do so.

The trial court granted relief which was precluded by the statute of limitations. That an untimely challenge to an arbitrator's decision runs counter to the federal labor policy favoring expeditious disposition of arbitration claims is beyond question. Federation v. Westinghouse, 736 F.2d 896(3d Cir.1984),901.

Waiver

From Ficek v. Southern Pacific,338 F.2d 655(9th Cir.1964), through Teamsters v. J.H.Merritt,770 F.2d 40(3d Cir.1985), to Dreis & Krump Mfg. v.Intern.Ass'n of Machinists, 802 F.2d 247(7th Cir.1986), petitioner has not located any departure from the application of waiver to failure to submit an issue to an arbitrator.

International v. Mobay,755 F.2d 1107 (4th Cir.1985),1112, contains one of many statments of the waiver rule.

> The union could not voluntarily engage in the arbitration of the issues submitted to the arbitrator

> and then attack the award on grounds not raised before the arbitrator.

The trial court in this action granted relief on the basis of the alleged possible lay off in 1983 and a recall list, neither of which were part of the record before the umpire. The circuit court, in affirming, decided a matter of federal labor law in a manner in conflict with its own rulings and those of other circuits and approved, without opinion, a departure from the usual course of judicial proceedings in the field of federal labor law, with respect to the statute of limitations and the applicable waiver rule.

Question No. 3 -Section II

Respondent Ford engaged in self-help in the face of an umpire's award. Ford chose not to submit the lay off-recall matter to the umpire, and, then, having lost in the arbitration on the matter of wrongful discharge,elected to treat the umpire's DECISION as if the umpire had awarded in Ford's favor on the very issues which Ford concealed from him.

Vaca v.Sipes,386 U.S.171(1967),186, did not overlook employer subversion(ES).

> [T]he employee should not be limited to the exclusive remedial procedures established by the contract when the conduct of the employer amounts to a repudiation of those contractual procedures.

See,also, Dogherra v.Safeway Stores,Inc., 670 F.2d 1293(9th Cir.1982).

Petitioner claims counsel fees on the theory summarized in Bowen v. United States Postal Service, 459 U.S.212(1983), 236 ,footnote 6, and punitive damages for

"callous"disregard of his rights as referred to in Bowen at 459 U.S.216.

The nature and extent of employer liability for POST AWARD conduct in the field of federal labor law is an important federal question which has not yet been settled by this Court.

Question No.4 -Section II

No investigation other than reading the umpire's DECISION was necessary for the union local in regard to post award conduct. Yet it abandoned its duty as petitioner's exclusive representive under the CBA. In every reported case a union has fulfilled its post award DFR by moving to confirm or vacate or by defending and counterclaiming for confirmation in timely fashion.* There are

* Kane Gas v.International Brotherhood, 687 F.2d 673(3d Cir.1982);Brotherhood v.Celotex,708 F.2d 488(9th Cir.1983); Federation v.Westinghouse,736 F.2d 896 (3d Cir.1984);International v.Mobay, 755 F.2d 1107(4th Cir.1985);Teamsters v. J.Merrit And Company,770 F.2d 40 (3d Cir.1985);American Postal Workers v.United States, 789 F.2d 1(D.C.Cir.1986); W.R.Grace v.Rubber Workers,461 U.S.757 (1983).

many more cases than the samples cited.

Petitioner claims counsel fees under the theory of Bowen cited in regard to respondent Ford above. To these he is entitled even if claims against the employer are not successful. Dutrisic v. Caterpillar Tractor, 749 F.2d 1270 (9th Cir.1983).

Petitioner also claims punitive damages for the egregious breach of DFR and fiduciary duty. Since International Brotherhood of Electrical Workers v. Foust, 442 U.S.42(1979), applies to "a union that breaches its duty of fair representation by failing properly to pursue a grievance",union punitive damages for post award conduct is undecided by this Court.

Question No. 5-Section II

It was the duty of the local union to represent petitioner at the hearing before the umpire. Private counsel was not present. The local union delegated the representation to the parent union whose Mr. Lew Caulford performed this task most ably. Thereafter, in the post award period, the parent union, which had assumed a duty of fair representation and was always under a fiduciary duty, joined the local union in the complete abandonment of petitioner.

The nature and extent of the liability of a parent union for POST AWARD conduct has not been, but should be settled by this Court.

Petitioner's claims with respect to all respondents in this action appear in the pre-trial stipulation at Pa7 1.

CONCLUSION

This petition covering two actions follows the claims which arose from the grievance, abandoned because of breach of DFR, ES, or both, through an arbitration award and beyond. After well fashioned relief, revival of the grievance, was ordered, the judicial supervision below of the system of private resolution abruptly became erroneous. That system, it is submitted, again requires the attention of this Court.

Each question presented for review is an important question which should be settled by this Court.

Respectfully submitted,

Judson L. Levin

JUDSON L. LEVIN
Attorney For Petitioner Dobbs

DATED: July 20 ,1987